STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 30, 2013
v	No. 308099 Wayne Circuit Court
KENNETH LEE THOMAS, Defendant-Appellant.	LC No. 11-003051-FH

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant, Kenneth Lee Thomas, appeals by right his jury trial convictions of carrying a concealed weapon, MCL 750.227(2); possession of a firearm during the commission of a felony, MCL 750.227b(1); and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to two years' imprisonment for his felony-firearm conviction and three years' probation for each of his carrying a concealed weapon and felon in possession convictions. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

During the early morning hours of January 16, 2011, defendant was at a gas station at the corner of Livernois and Joy Road in Detroit. Police officers George Alam and Sean Wall were at the gas station at that same time as defendant. The officers testified at trial that they observed defendant exit the gas station at a high rate of speed. The officers followed defendant in their marked scout car and observed him cross several lanes of traffic without signaling. While driving directly behind defendant, Officer Alam observed what appeared to be a gun come out of the passenger window of defendant's vehicle. The officers effected a traffic stop. Defendant initially gave the officers a false name, and he did not have a driver's license. Officer Alam retraced their path to recover what defendant had thrown from the window; he found that the object was, in fact, a gun. He also found a black holster in the middle of the street. Officer Alam testified that when defendant was being processed after he was arrested, he told Officer Alam that he had "done it in the past" and gotten away with it and that the reason Officer Alam caught him was because the holster was stuck on his pants.

Defendant testified at trial that on the night in question, he was walking out of the gas station as the officers were pulling into the station in their "narcotics" vehicle; defendant made eye contact with Officer Alam. Defendant testified that he and his friend, Lawrence Saffold[1], were exiting the gas station and heading to their respective vehicles at the same time. Defendant testified that if he had taken off at a high rate of speed, he would have run into the gas station because his car was facing the station. Rather, he backed up and "[s]tepped on it" out of the gas station, heading south on Livernois. Defendant denied possessing a weapon or throwing one out of his vehicle's window. He also testified that he saw Saffold walking on Livernois when he left the gas station; he observed a state trooper vehicle arrive at the scene of his arrest and the officers confer with one another outside their vehicles. According to defendant, Saffold was booked and processed at the same time he was at the police station. Both officers testified that they did not see Saffold that night, but Officer Alam did say he saw a car driving up and down Livernois.

During trial, defense counsel began to present photographs of the scene of defendant's arrest and the area around the gas station. Defense counsel, however, did not move for the admission of the exhibits until after the closing arguments had concluded; the trial court denied the request due to a lack of foundation.

The jury convicted defendant, and the trial court sentenced him as described above. Defendant then moved the trial court for a new trial or an evidentiary hearing, arguing that the officers who testified at trial committed perjury and that his trial counsel was ineffective for failing to properly investigate the case. The trial court denied the motion.

II. ALLEGED PERJURY

Defendant first argues on appeal that there were several instances where the officers perjured themselves while testifying at trial. "It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). A person commits perjury by willingly testifying falsely under oath. *People v Lively*, 470 Mich 248, 254; 680 NW2d 878 (2004); see also MCL 750.423(1). Preserved constitutional errors require reversal unless the prosecution can prove that the error was harmless beyond a reasonable doubt. *People v Anderson*, 446 Mich 392, 406-407; 521 NW2d 538 (1994).

Defendant asserts that the officers lied at trial when they said he exited the gas station at a high rate of speed. Defendant insists that he could not leave quickly because he would have had to turn around and go to the proper exit. The officers' testimony, however, does not contradict defendant's story. For example, defendant could have backed up and then sped off out of a proper exit; indeed, defendant himself stated that after backing up, he "[s]tepped on it out of the

[1] It is unclear from the record whether defendant's friend's last name is Safford or Saffold. Each name is used interchangeably in the trial transcript. However, the majority of references indicate Saffold.

gas station." Nothing in the record supports that the officers provided perjured testimony with respect to their observations. See *Lively*, 470 Mich at 254.

Defendant next asserts that Officer Wall committed perjury by stating that the recording device in the patrol car was working, as no video was entered into evidence. Defendant misapprehends Officer Wall's testimony. Officer Wall never stated that the recording device on the video camera was working, only that the system appeared to be working because the picture screen in the car was on at the beginning of the shift. Therefore, the record does not support that the officer committed perjury. See *id.*

Defendant next argues that the officers perjured themselves when they testified that they followed defendant out of the gas station. He claims they did not get directly behind his car until they pulled him over and, therefore, that they could not have seen him throw anything out the window. Defendant, however, provides no evidence besides his own testimony. "It is not enough simply to contradict [testimony], but evidence of the truth of the contradiction must come from evidence of circumstances bringing strong corroboration of the contradiction." *People v Cash*, 388 Mich 153, 162; 200 NW2d 83 (1972). As the record only provides a contradiction and no corroborating evidence, it does not support a claim of perjury. See *id.*

Next, defendant argues that the officers committed perjury when they testified that Saffold was not arrested the same night as defendant. Defendant contends that Saffold was arrested the same night as he was and, presumably, could have been the owner of the gun found by the officers. Again, defendant's argument misapprehends the testimony. The officers only testified that they did not know whether Saffold was arrested. Therefore, the record does not support that the officers perjured themselves. See *Lively*, 470 Mich at 254. Defendant's last argument is that Officer Alam committed perjury when he testified that he found a gun holster on Livernois and later testified that defendant admitted he got caught because the holster was stuck on his pants. Defendant's argument in no way supports a claim of perjury because the two statements are not irreconcilable; for example, defendant could have had two holsters. Accordingly, defendant has not shown that reversal is necessary. See *id.*

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also contends that his trial counsel was ineffective. We review this claim for mistakes apparent on the record because no evidentiary hearing was held. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "[D]efendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant first argues that trial counsel was ineffective by failing to properly investigate the case. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Substantial defenses are those that might have made a difference in the outcome of the trial. *Id.* Defendant argues that trial counsel failed to investigate by failing to obtain the patrol car video of

defendant's chase and arrest. First, the record reflects that almost immediately after filing an appearance in the case, defense counsel sought to obtain the patrol car video. He secured an order from the court on January 31, 2011, requiring that the video be produced, if it existed. The prosecution also produced to the trial court a copy of a letter it had received from defense counsel indicating that he had pursued efforts to obtain the video and been advised by "Sgt. Mills, the OIC," that "there is no video in existence." The record evidence discredits defendant's argument that defense counsel was dilatory. Second, defendant has produced no evidence that the video existed or what the video would have shown. Without any such evidence, defendant has failed to establish the factual predicate for his claim; therefore, we cannot conclude that trial counsel was ineffective. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant also argues that counsel should have determined that defendant was arrested only three blocks from the gas station. Defendant provides no explanation of how this information would have provided him any defense. As such, defendant has failed to show that counsel's failure to investigate fell below an objective standard of reasonableness and that, but for counsel's mistake, it is reasonably probable that the outcome of the trial would have differed. See *Frazier*, 478 Mich at 243. Lastly, defendant argues that counsel should have determined that there was little snow on the night in question, thereby proving that Officer Alam was lying when he said the gun was found on top of the snow. However, defendant provides no evidence of the amount of snow on the ground on the day in question and, therefore, has failed to establish a factual predicate for his claim, see *Hoag*, 460 Mich at 6, and meet his burden of proof in showing that counsel was ineffective, see *Frazier*, 478 Mich at 243.

Defendant next argues that trial counsel was ineffective when he failed to admit the photographs of the scene of the arrest and the gas station. Defendant must show that the failure to present evidence denied him a substantial defense. See *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Contrary to defendant's argument, the photographs would not show that the officers lied under oath because they would not negate the fact that defendant could have sped out of the gas station after making his way to an exit. Moreover, counsel discussed the photographs with defendant during direct examination, and defendant was allowed to present his side of the story regarding how he left the gas station on the night in question. Therefore, defendant has not been denied a substantial defense, and trial counsel was not ineffective. See *id*.

Finally, defendant argues that trial counsel was ineffective for failing to call several witnesses. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant asserts that counsel should have called Saffold as a witness; however, defendant provides no evidence as to Saffold's potential testimony. Therefore, defendant has not established that he has been denied a substantial defense or that counsel's actions fell below an objective standard of reasonableness. See *id.*; *Frazier*, 478 Mich at 243. Defendant also contends that counsel should have called Korey Thomas, defendant's brother, as a witness. Korey's affidavit states that he would have testified that he saw Saffold get arrested in the area where the gun was found on the same night defendant was arrested. That testimony, however, simply replicates defendant's testimony at trial. As the jury already heard that defense, defendant cannot prove that he was denied a substantial defense. See *Dixon*, 263 Mich App at 398. More importantly, Korey's testimony would not exculpate defendant where Korey did not aver that the gun belonged to or was left in the snow by Saffold. Lastly, defendant claims that

counsel should have called the gas station attendant as a witness. Defendant, however, provides no evidence about the gas station attendant's potential testimony or if the person working that night witnessed anything. Defendant has neither established a factual predicate for his claim that the attendant should have been called, see *Hoag*, 460 Mich at 6, nor proven that counsel was ineffective, see *Dixon*, 263 Mich App at 398.

IV. REMAND

Lastly, defendant requests that this Court remand to the trial court for an evidentiary hearing regarding trial counsel's failure to call Saffold, Korey, defendant's wife Danielle Thomas, and the gas station attendant as witnesses, as well as trial counsel's failure to have the previously mentioned photographs admitted into evidence. Defendant failed to properly move this Court pursuant to MCR 7.211(A). Even so, we have considered the issues as presented by defendant and determined that an evidentiary hearing is not required pursuant to MCR 7.211(C)(1).

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro